



**Fourth Court of Appeals**  
**San Antonio, Texas**

**MEMORANDUM OPINION**

No. 04-22-00054-CV

Douglas K. **SMITH**,  
Appellant

v.

**PIONEER BANK**,  
Appellee

&

No. 04-22-0056-CV

**IN RE Douglas K. SMITH**

Original Mandamus Proceeding<sup>1</sup>

From the 57th Judicial District Court, Bexar County, Texas  
Trial Court No. 2021-CI-24897  
Honorable Norma Gonzales, Judge Presiding

Opinion by: Luz Elena D. Chapa, Justice

Sitting: Luz Elena D. Chapa, Justice  
Irene Rios, Justice  
Beth Watkins, Justice

Delivered and Filed: August 17, 2022

**AFFIRMED; PETITION FOR WRIT OF INJUNCTION DENIED AS MOOT; STAY LIFTED**

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<sup>1</sup> This proceeding arises out of Cause No. 2021-CI-24897, styled *Douglas K. Smith v. Pioneer Bank*, pending in the 57th Judicial District Court, Bexar County, Texas, the Honorable Norma Gonzales presiding.

This matter arises out of an accelerated, interlocutory appeal and original proceeding challenging the trial court's order denying appellant/relator Douglas K. Smith's application for a temporary injunction. Smith asserts the trial court abused its discretion in denying his request for a temporary injunction because he established how appellee/real-party-in-interest Pioneer Bank failed to comply with the statutory and procedural requirements governing a nonjudicial foreclosure, causing him probable injury and imminent harm. We affirm the trial court's order, deny as moot Smith's petition for writ of injunction, and lift the stay we imposed in these cause numbers.

### **BACKGROUND**

In 2013, Smith signed a home equity note and security instrument creating a lien over his residential homestead. Smith remained current on his payments under the note until July 2020 when Pioneer Bank, the current holder of and beneficiary under the note and security instrument, sent Smith a Notice of Default and Intent to Accelerate on July 29, 2020. In the notice, Pioneer Bank alleged Smith was past due on his monthly payments and 2019 ad valorem taxes and indicated it would accelerate the note if Smith did not cure the defaults by August 30, 2020. Smith did not cure the defaults, and five months later, Pioneer Bank filed a verified application pursuant to Texas Rule of Civil Procedure 736 seeking an order to authorize a nonjudicial foreclosure. On February 26, 2021, the trial court signed an order granting Pioneer Bank's application and authorizing the foreclosure.

Smith filed for Chapter 11 bankruptcy, staying the foreclosure until the bankruptcy court granted Pioneer Bank's request to proceed. To stop the foreclosure, Smith filed this underlying suit seeking an accounting, a claim for violation of the Texas Debt Collection Practices Act, estoppel, quiet title action, declaratory judgment, a claim for tortious interference with a

contractual relationship, and attorney's fees. Smith also sought a temporary restraining order and temporary and permanent injunction to enjoin Pioneer Bank from foreclosing on the property.

The trial court granted Smith's request for a temporary restraining order and set Smith's application for a temporary injunction for a hearing. After the hearing, the trial court denied Smith's request for a temporary injunction, and Pioneer Bank posted Smith's property for foreclosure. Smith filed a notice of appeal, petition for writ of injunction, and emergency motions in each of these cause numbers requesting this court to stay the foreclosure. We granted Smith's motions, stayed the foreclosure of his property, and later consolidated the appeal and original proceeding after concluding the legal issues before us were related. We begin by considering Smith's appeal.

#### **APPEAL**

On appeal, Smith argues the trial court abused its discretion in denying his request for a temporary injunction because Pioneer Bank failed to comply with the statutory notice requirements outlined in section 51.002 of Texas Property Code and procedural requirements authorizing a foreclosure outlined in Texas Rules of Civil Procedure 735 and 736. Smith also argues Pioneer Bank violated the security instrument by not allowing him to reinstate the note, and Pioneer Bank's conduct deprived him from obtaining income. According to Smith, he established a prima facie showing of probable injury and imminent harm entitling him to a temporary injunction.

#### ***Standard of Review***

"A temporary injunction's purpose is to preserve the status quo of the litigation's subject matter pending a trial on the merits." *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). It is an extraordinary remedy, and a trial court does not issue it as a matter of right. *Id.* "To obtain a temporary injunction, the applicant must plead and prove three specific elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent,

and irreparable injury in the interim.” *Id.* A trial court has discretion as to whether to grant or deny a temporary injunction. *Id.* We, as the reviewing court, will reverse an order granting injunctive relief only if we conclude the trial court abused its discretion. *Id.* We must not substitute our judgment for the trial court’s judgment “unless the trial court’s action was so arbitrary that it exceeded the bounds of reasonable discretion.” *Id.* “Instead, we view the evidence in the light most favorable to the trial court’s order, indulging every reasonable inference in its favor, and determine whether the order is so arbitrary that it exceeds the bounds of reasonable discretion.” *Amend v. Watson*, 333 S.W.3d 625, 627 (Tex. App.—Dallas 2009, no pet.).

***Requirements of Section 51.002 of the Texas Property Code***

Section 51.002 of the Texas Property Code governs the sale of real property under a contract lien. TEX. PROP. CODE § 51.002. It requires the servicer of a contract lien to serve the debtor “with written notice by certified mail stating that the debtor is in default under the . . . contract lien” and give “the debtor at least 20 days to cure the default before notice of sale can be given.” *Id.* § 51.002(d). It further provides “[s]ervice of a notice under this section by certified mail is complete when the notice is deposited in the United States mail, postage prepaid and addressed to the debtor at the debtor’s last known address.” *Id.* § 51.002(e). An affidavit attesting of the facts to that effect is prima facie evidence of service. *Id.*

Smith contends he was entitled to a temporary injunction because Pioneer Bank “provided no evidence of mailing the 20 day notice letter as required by [section] 51.002(e).” The record, however, includes a copy of Pioneer Bank’s verified application seeking foreclosure of the residential property. Attached to the application is a copy of Pioneer Bank’s July 29, 2020 Notice of Default and Intent to Accelerate sent to Smith by certified and first-class mail. A copy of the certified mail receipt is also attached to this notice. Additionally, the record includes an affidavit from Pioneer Bank’s Chief Credit Officer, who attested on July 29, 2020, the bank sent Smith

notice of his defaults and its intent to accelerate the note via certified mail, return receipt requested and first class. This evidence constitutes prima facie evidence of service. *See id.*

Smith, however, contends the notice letter is defective because it did not include Pioneer Bank's intent to accelerate the note. According to Smith, the "letter only demanded that [he], within 30 days, verify or dispute whether the indebtedness . . . was valid or not." We disagree. A review of the note shows it states:

YOU ARE HEREBY NOTIFIED THAT IF THE ABOVE DEFAULTS ARE NOT CURED BY 5:00 P.M., CENTRAL STANDARD TIME, **ON MONDAY, AUGUST 31, 2020 (CURE DATE)**, LENDER WILL ACCELERATE ALL SUMS DUE AND OWING UNDER THE LOAN DOCUMENTS AND DEMAND FULL PAYMENT THEREOF. AS OF THE DATE OF ACCELERATION, ALL OUTSTANDING PRINCIPAL, ACCRUED INTEREST, FEES, AND EXPENSES UNDER THE LOAN DOCUMENTS WILL BE DUE AND OWING. ALL PAYMENTS MUST BE MADE BY CERTIFIED FUNDS/CASHIER'S CHECK TO LENDER.

We therefore conclude the trial court did not abuse its discretion in denying Smith's request for a temporary injunction because Smith did not establish Pioneer Bank failed to comply with the statutory notice requirements outlined in section 51.002 of the Property Code. Accordingly, we overrule his challenges relating to this section.

***Requirements Under Texas Rules of Civil Procedure 735 and 736***

Under Texas Rule of Civil Procedure 735.1, when a security instrument associated with a home equity loan contains a power-of-sale provision, a lender may use the process outlined in Texas Rule of Civil Procedure 736 to obtain a court order allowing it to foreclose on a property. *De La Garza v. Bank of New York Mellon*, No. 02-17-00427-CV, 2018 WL 5725250, \*6 (Tex. App.—Fort Worth Nov. 1, 2018 no pet.) (mem. op.); *see* TEX. R. CIV. P. 735.1 (stating Rule 736 provides the procedure for obtaining court order to allow foreclosure of home-equity loan containing a power of sale in security instrument). Texas Rule of Civil Procedure 736.1 requires

a party seeking such an order to file “a verified application in the district court in any county where all or any part of the real property encumbered by the lien is located.” *In re OneWest Bank, FSB*, 430 S.W.3d 573, 576 (Tex. App.—Corpus Christi-Edinburg 2014, no pet.) (citing TEX. R. CIV. P. 736.1(a)). The rules allow a respondent to file a response to the application and outline whether the trial court has to hold a hearing on the application. *Id.* (citing TEX. R. CIV. P. 736.4-736.7). Once the applicant establishes the basis for the foreclosure, the court must issue an order granting the application for foreclosure. *Id.* “After an order is obtained, the foreclosure may proceed.” *Id.* at 577.

Smith contends Pioneer Bank failed to comply with Rules 735 and 736 because “it never obtained court approval prior to commencing the foreclosure process when it accelerated the note before filing an application for permission to commence foreclosure proceedings.” Smith seems to suggest Pioneer Bank was required to obtain court approval to send its notice of intent to accelerate the note before filing its Rule 736 application. There is nothing in the rules requiring prior approval. Other than making this assertion, Smith does not point us to any authority requiring prior approval, and we have found none. Accordingly, the trial court did not abuse its discretion in denying Smith’s request for a temporary injunction because contrary to Smith’s assertion, Pioneer Bank was not required to seek prior approval before accelerating the note. We therefore overrule Smith’s challenges relating to these rules.

### ***Right to Reinstate***

Smith next argues he was entitled to a temporary injunction because Pioneer Bank violated the terms of the security instrument by not allowing him the opportunity to reinstate the note. Both parties agree under the terms of the note, the borrower had the right to reinstate the note “prior to the earliest of: (a) five days before sale of the Property pursuant to any power of sale contained in

this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument.”

Here, section (a) is inapplicable, and the parties have identified no example of subsection (b). Thus, section (c) provides the earliest deadline for reinstatement, and at the temporary injunction hearing, Smith did not provide any evidence he requested reinstatement five days before February 26, 2021, the date of the entry of the order granting Pioneer Bank's request to foreclose. Instead, the trial court heard testimony from Smith's lawyer, who testified around the end of 2021, he began working on a forbearance agreement with Pioneer Bank, and “as part of a forbearance agreement[,] we had asked that we include in that agreement that within five days of the execution of that agreement that we be provided a reinstatement quote.” He then added the forbearance agreement was never executed. The trial court also heard testimony from a Pioneer Bank representative stating it never saw a request from Smith to reinstate the loan five days before the entry of the February 26, 2021 order.

As the fact finder, we may not substitute our judgment for the trial court's judgment, and here, the trial court had discretion to believe Smith did not timely request reinstatement of the note. *See Butnaru*, 84 S.W.3d at 204. Accordingly, we conclude the trial court's action in denying Smith's request for a temporary injunction was not so arbitrary as to exceed the bounds of reasonable discretion, and we overrule Smith's challenge regarding reinstatement. *See id.*

### ***Equity***

Finally, Smith argues Pioneer Bank's conduct obstructed his ability to earn income and make his mortgage payments, and therefore, the trial court should have granted his request for a temporary injunction out of equity. A trial court exercises broad discretion when a party seeks equitable relief. *City of San Antonio v. Rankin*, 905 S.W.2d 427, 431 (Tex. App.—San Antonio 1995, no writ). Here, other than asserting this conclusory statement, Smith does not point us to

any evidence of conduct by Pioneer Bank showing it prevented Smith from earning income. *See* TEX. R. APP. P. 38.1. Accordingly, to the extent Smith requests the trial court should have granted his request for a temporary injunction out of equity, we hold the trial court did not abuse its discretion in ruling against Smith.

***Conclusion***

After viewing the evidence in the light most favorable to the trial court’s order denying Smith’s request for a temporary injunction, we conclude the trial court did not abuse its discretion. We therefore affirm the trial court’s order.

**WRIT OF INJUNCTION**

In addition to his appeal, Smith filed a petition for writ of injunction asking us to issue a writ enjoining Pioneer Bank from proceeding with the foreclosure of his property during the pendency of this appeal. We “may issue a writ of injunction only if it is necessary to protect [our] jurisdiction over the subject matter of a pending appeal, or to prevent an unlawful interference with the enforcement of our judgments and decrees.” *In re Alamo Defs. Descendants Ass’n*, 619 S.W.3d 363, 367 (Tex. App. 2021—El Paso, no pet.). Having determined the merits of Smith’s related appeal, we deny Smith’s petition as moot.

**STAY**

On January 31, 2022, we granted Smith’s emergency motions filed in each of these causes, and we stayed the foreclosure of his property pending resolution of this appeal and original proceeding. Having resolved these matters, we lift the stay we previously imposed in each of these cause numbers.

Luz Elena D. Chapa, Justice